

**TOWN OF KITTERY, MAINE
BOARD OF APPEALS**

**APPROVED
July 28, 2015**

Members present: Brett Costa, Craig Wilson, Gary Beers, Niles Pinkham, Jeffery Brake

Members absent: Brian Boyle

Staff: Robert Marchi, Code Enforcement Officer

Chairman Costa called the meeting to order at 7:02 p.m.

Town of Kittery Live Streaming Video for this meeting is found at:

http://www.townhallstreams.com/locations/kittery-maine/events/26111/council_chambers

The broadcast runs for one hour and 32 minutes.

1. Call to Order, Introductory, Roll Call

2. Pledge of Allegiance

3. Agenda Amendment and Adoption

Chairman Costa adopted the agenda as presented.

4. Executive session - NONE

5. Public Hearings:

NOTICE 1: Published in a local newspaper of general circulation on July 22, 2015.

Jeremy Kites, Map 11, Lot 28A, 46 Martin Road, Suburban Residential zone (RS)

Requesting Miscellaneous Variation Request to the terms of Title 16.7.3.5.5.A

& 16.7.3.5.6.B, to replace an existing 9' 5" x 27' 10" shed with a 12' x 24' garage,
going no closer than existing structure.

Applicant's Case First

Mr. Kites represented himself and stood on his application. He noted from the Board memorandum that his proposal was 15.5sf larger than what existed and he offered to match the current size, if necessary.

Public Testimony

Chairman Costa invited anyone in attendance to speak for, against, or about the appeal, in any way. No one came forward to offer testimony.

Code Enforcement Office

Mr. Marchi stated that he had nothing to add to the application.

Deliberations

Mr. Beers expressed this review of the necessary considerations regarding the request, concluding that he believed it met all the necessary criteria including those in Title 16, Sections 7.3.5.5A & 7.3.5.6B regarding Nonconforming Structure Repair, Expansion, or Reconstruction.

Chairman Costa polled the Board who considered likewise.

Mr. Beers moved to grant the Miscellaneous Variation Request to Jeremy Kites to remove an existing 9' 5" x 27' 10" (262.5sf) shed and replace with a 12' X 24' (288sf) single car

garage on slab; and, relocate home entry steps (two steps) from driveway side of entry deck to road side to allow for garage access at 46 Martin Road, Map 11 - Lot 28A in the Residential-Suburban (RS) zone.

Mr. Wilson seconded. Ayes: 5 Nays: 0 Abstain: 0 Motion carried.

Chairman Costa noted that the approval is not the granting of a building/regulated activity permit, and any aggrieved party may appeal this decision to Superior Court within 45 days. He requested and Mr. Kites acknowledged by signing the request document.

FINDINGS OF FACT:

The Board of Appeals does have jurisdiction to hear this matter.

The Standard of Review was determined to require substantial evidence.

There are no outstanding violations on the property.

The application is complete and the applicant does have standing.

The applicant's Burden of Proof was clarified.

Jeremy Kites, applicant, is the owner of the premises at 46 Martin Road, Map 11 Lot 28A. The structures there were built in 1956, and with the lot, predate present zoning ordinances and are legally nonconforming.

The applicant applied for a Miscellaneous Variation Request, dated 04/29/15, under Town Code Title 16, Chapter 16.7, Article III, Nonconformance, Sections 7.3.5.5A & 7.3.5.6B, seeking, to remove an existing 9' 5" x 27' 10" (262.5sf) shed and replace with a 12' X 24' (288sf) single car garage on slab; and, relocate home entry steps (two steps) from driveway side of entry deck to road side to allow for garage access at 46 Martin Road, Map 11 - Lot 28A in the Residential-Suburban (RS) zone.

Map 11 Lot 28A is not in a Shoreland or Resource Protection Overlay zone.

The proposal does meet Section 7.3.5.5 Nonconforming Structure Repair / Expansion criteria.

The proposal does meet Section 7.3.5.6 Nonconforming Structure Reconstruction criteria.

Other Chapter 3 zone standards are not applicable.

The result of this proposal would not be more nonconforming.

Factors or Considerations (Title 16, Sections 6.6.1 & 6.6.2) do not raise concern.

The Board did not establish approval conditions.

The applicant's evidence presented for the matter: was substantial; was credible; is not outweighed by conflicting evidence from the Town; and, the applicant did meet the burden of proof for granting the request.

Mr. Kites' application was dated 4/29/15 and the Board is obligated to conduct a hearing within 30 days, however Mr. Kites had requested a postponement until this date.

Mr. Kites represented himself and stood on his application. He noted from the Board memorandum that the proposal was 15.5sf larger than what existed and he offered to match the current size, if necessary.

The Code Enforcement Officer had nothing to add to the submitted application. There were no public comments.

Mr. Beers moved to accept the Findings of Fact.

Mr. Wilson seconded. Ayes: 5 Nays: 0 Abstain: 0 Motion carried.

CONCLUSIONS OF LAW:

The Board determined the following ordinance provisions link the specific statements covered in the findings of fact to the performance standards/review criteria which the applicant was required to meet in order to receive the Board's approval:

The Board of Appeals has the authority to grant a Miscellaneous Variation Request, under Town Code Title 16, Section 1.5.2F4a, pursuant to Sections 6.4.3A, Miscellaneous Variation Request; 7.3.5.5 Nonconforming Structure Repair and/or Expansion; and, 7.3.5.6 Nonconforming Structure Reconstruction.

Mr. Beers moved to accept the Conclusions of Law.

Mr. Wilson seconded. Ayes: 5 Nays: 0 Abstain: 0 Motion carried.

NOTICE 2: Published in a local newspaper of general circulation on July 22, 2015.
Thomasine Piche, owner, Bruce Piche, Timothy Moore, applicants, for Map 9 Lot 143, 7 Shapleigh Road, Business-Local 1 B-L1 zone requesting Special Exception for Mechanical services & engine repair per Title 16.3.2.9.C.8.

Applicant's Case First

Mr. Timothy Moore represented himself and stood on his application. He stated he has an outboard business repair down there. He repairs outboards and runs the motor when he is completed to make sure the repair was successful. He stated he runs them on a hose which is only supposed to run them for a short period of time. On any given day the total run time might be 30 minutes throughout the entire day. Some motors can be very loud but the duration of run time is very short. Mr. Moore noted he's not making large amounts of noise all day long.

Public Testimony

Chairman Costa invited anyone in attendance to speak for the appeal, in any way.

Ms. Debbie Driscoll-Davis representing Driscoll realty which owns 5 Shapleigh Road where Dan's Crossing is located right next to 7 Shapleigh Road. She noted the boat business is something new and according to records shows it started 1 year and 2 months ago. This year it has become intolerable for most of her tenants that live at 5 Shapleigh Road which houses 5 apartments and 2 businesses. 2 Tenants have also attended tonight, one is vacating the premises if this business continues, the other has relocated to the south side of the building. Ms. Driscoll believes the business is more of a boat yard than mechanical service. She then read the description of a boat yard "a business or gainful occupation where boats are stored, hauled, repaired or constructed."

She doesn't believe that is allowed in a local business 1 zone. She believes on some days the motors are run for more than 30 minutes of time. She complained of being hit by a waft of exhaust when coming to work and can smell gas quite regularly. If this business were being run inside it might be

more tolerable. One of her businesses on the first floor is an organic bedding company she's sure having this business next door has been difficult for them.

Ms. Marsia Quill wished to present written materials and photographs to the Board. Mr. Beers raised a Point of Order regarding the Board accepting them. Ms. Quill also advised that she had a video recording of the noise generated at the applicant's location. The Board concluded that the written materials were her printed statement she would read aloud and into the record; and, would be accepted.

Ms. Marsia Quill is the author of the written document to the town of Kittery Board of Appeals. Ms. Quill stated I have been a tenant at Dan's Crossing at 5 Shapleigh Road since April 2012. My unit is on the second floor and has a deck that overlooks an adjacent property that has started a boat engine repair business. This is my 4th summer at Dan's Crossing. During the summer of 2012 and 2013 no boats were being stored or worked on next door. Last summer, 2014, I saw boats being stored on the property and heard the running boats engines (that was an inconvenience) but thought the boats might have belonged to the property owner and that repairing them was a temporary situation. This summer, particularly the last 6 weeks, has proven this not to be the case. The property is now full of boats that are being hauled in and out daily, boat engines are being revved continuously, and exhaust fumes that are visible are spewing so much so that I have to keep my windows closed during the few short summer months in Maine. I can no longer sit outside on my deck because of the noise and fumes. One example of activity occurred on Friday, 7/24/15, that I can provide video proof of, where the repair work started on a boat's engine at 9:15am. When the boat engine repair was complete the boat was then power washed as was also the mechanic's truck which required another engine running which generated more noise. When this boat was picked up another boat was towed in and this repair lasted until 8pm on Friday night. I had the day off on Friday 7/24/15 but was forced to leave my apartment mid-day for a few hours of relief because this noise was intolerable and the fumes were coming into my apartment before being forced to again shut my windows. Repair work and revving of a boat engine was also being performed on Sunday 7/26/15, at 4:30 in the afternoon, which I have video of. I work out of my apartment and the noise created from this business has also made it difficult to my job. I can barely have a conversation on the phone with my clients. The noise is ever present, loud and disruptive; so much so that living at Dan's Crossing has become intolerable. I have reluctantly been forced to give my notice to vacate Dan's Crossing to my landlord and Property Manager, Debbie Driscoll; it's not something I want to do. But since the boat business has become active this summer, I can no longer tolerate the present living conditions. I respectfully request that the Board of Appeals take into consideration the impact to others in the neighborhood when granting continued occupancy of this boat repair business. It was not an active business when I moved in and it is the sole reason for me having to vacate Dan's Crossing. However, I would remain a tenant at Dan's Crossing if the occupancy permit is denied.

Ms. Quill then played a segment of audio she had of boats being power washed and boat engines being run.

Ms. Lorette Cavitori lives at 5 Shapleigh Road apartment 302 and has lived there since August 2010. She noted the engine repair is within the past year. She works at home exclusively and all of her conference calls are recorded. Working from home has become very difficult. She has the phone number of Tim and when she has a call she does let him know and he has been good about stopping work during that time. The noise is not 15-30 minutes but consistent throughout the day.

Because of her nature of work she has had to move to another apartment on the south side of the building. She stated she would be forced to vacate the premises if the noise continues because she does work exclusively from home.

Chairman Costa invited anyone in attendance to speak against the appeal, in any way.

Mr. Chandler Scully spoke in favor of the applicant. He stated he does work in the shop from time to time. He also lives right up the road and doesn't hear much of the noise.

Chairman Costa invited anyone in attendance to speak about the appeal, in any way.
No one else came forward.

Mr. Moore requested recognition to offer rebuttal. He stated there's no possible way he could be running boats all day long. He fixes the boats, starts up the boats and then takes them to the ocean to run the motor. Allot of his work is done inside turning a wrench which doesn't make any noise

Code Enforcement Office

Mr. Marchi stated he responded to a noise complaint about work being done at 7 Shapleigh Road. He notified Mr. Piche and Timmy that under the current zoning it wasn't an allowed use. The town had nothing further.

Deliberations

Extensive Board discussion ensued.

There were many issues raised during the board deliberation regarding noxious gas and the noise level of Mr. Moore's business. One of the discussions presented was doing the work inside instead of outside to contain the fumes and lower the noise. Ultimately the board decided it was in their right to set limitations for the business and not come up with solutions regarding fumes and noise for them.

Mr. Beers moved to grant the Miscellaneous Variation Request, dated 7/7/15, for a Special Exception Use under Town Code Title 16, Section 3.2.9C8, pursuant to Section 6.4.4, Special Exception Use Request, to Thomasine Piche, Bruce Piche, and Timothy Moore to conduct mechanical services / engine repair of outboard engines at 7 Shapleigh Road, Map 9 - Lot 143, in the Business – Local 1 (B-L1) zone.

Conditions of Approval established are:

No use, or materials incidental thereto, or produced thereby, may give off obnoxious gases, odors, smoke or soot; no use will cause disturbing emission of electrical discharges, dust, light, vibration or noise that would be a nuisance to abutting properties at the property boundary; and, motor testing operating hours are restricted to Monday through Friday from 8:00am to 5:00pm.

Mr. Pinkham seconded.

Mr. Wilson asked for discussion. He expressed that under Section 16.6.6.2O, the Board must address whether the proposed use anticipates and eliminates potential nuisances and we had not done so.

He moved to amend the motion to include:

The proposed engine testing must be conducted in a sound deadening enclosure.

Mr. Beers seconded. Ayes: 5 Nays: 0 Abstain: 0 Motion carried.

Chairman Costa called the amended main motion.

Ayes: 5 Nays: 0 Abstain: 0 Motion carried.

Chairman Costa noted that the approval is not the granting of a building/regulated activity permit, and any aggrieved party may appeal this decision to Superior Court within 45 days. He requested and Mr. Moore acknowledged by signing the request document.

Mr. Marchi asked to be recognized. He stated that he and his office were very willing to work with the applicant to see that things worked out for all parties.

FINDINGS OF FACT:

The Board of Appeals does have jurisdiction to hear this matter.

The Standard of Review was determined to require substantial evidence.

There are no outstanding violations on the property.

The application is complete and the applicant does have standing.

The applicant's Burden of Proof was clarified.

Thomasine Piche is the owner of the premises at 7 Shapleigh Road, Map 9 Lot 143. The structure there was built in 1940 and has been in continuing service/retail use.

The applicants applied for a Miscellaneous Variation Request, dated 7/7/15, under Town Code Title 16 Section 3.2.9C8, pursuant to Section 6.4.4, Special Exception Use Request, to conduct mechanical services / engine repair at the premises.

Map 9 Lot 143 is not in a Shoreland or Resource Protection Overlay zone.

The zone Special Exception Uses does include what the applicant proposes.

There are no other Chapter 3 zone standards applicable.

The Board chose not to refer the proposal in accordance with Section 6.5.6, Special Exception Referral.

Factors or Considerations (Title 16, Sections 6.6.1 & 6.6.2) do raise concern as reflected in the conditions of approval.

The board did establish approval conditions as specified in the granting motion.

The applicant's evidence presented for the matter: was substantial; was credible; is not outweighed by conflicting evidence from the Town; and, the applicant did meet the burden of proof for granting the request.

Bruce Piche testified that he has done work under the building since 1971. The building was formerly a car dealership with room under to work on vehicles.

In Public Comment Tim Moore, the grandson of Bruce and Thomasine Piche testified to running outboard motors 30 minutes a day.

Chandler Scully testified in favor and has been working down there.

Public Comment opposed Debbie Driscoll-Davis owns & represents 5 Shapleigh Road Dan's crossing acknowledged Bruce Piche has worked mechanically back there for some time. Boat work is a new operation within the last year. There are 5 apartments and 3 businesses. 1 resident has had to move already and another will move if issue is not resolved. Ms. Davis suggested this is a boat yard opposed to mechanical services and testified that conference calls by resident are not possible at times. Exhaust issues, smell of gas, all testing outside with no sound muffling, Organic bedding business would be adversely effected if continuation of use.

Marsia Quill resident of 5 Shapleigh Road testified, read a statement and played an audio.

Lorette Cavitori testified she's lived in the building since Aug. 2010 and the engine repairs have been happening in the last year. She works exclusively from home and records conference calls, background noise cannot happen. She has worked with applicant on being able to make calls but still remains a problem she would be forced to move if there is no solution to this problem.

Tim Moore gave rebuttal and said he couldn't run engines all day long and does a significant amount of repair that has generates no noise.

The CEO testified that this was in response to a complaint and had the applicant come to the board of appeals to resolve the issues.

There was a voluminous board discussion which can be found on audio and video recordings of this meeting.

Mr. Beers moved to accept the Findings of Fact.

Mr. Wilson seconded. Ayes: 5 Nays: 0 Abstain: 0 Motion carried.

CONCLUSIONS OF LAW:

The Board determined the following statute/ordinance provisions link the specific statements covered in the findings of fact to the performance standards/review criteria which the applicant was required to meet in order to receive the Board's approval:

The Board of Appeals has the authority to grant a Miscellaneous Variation Request, Special Exception Use, under Town Code Title 16, Section 1.5.2F4d, pursuant to Sections 6.4.4A, Special Exception Use Request and 3.2.9, Business – Local 1, C. Special Exception Uses, 8. Mechanical Services; and, the Board has the authority to establish conditions of approval in granting the request pursuant to Town Code Title 16, Section 6.6.3, Additional Special Exception Conditions.

Mr. Beers moved to accept the Conclusions of Law.

Mr. Wilson seconded. Ayes: 5 Nays: 0 Abstain: 0 Motion carried.

6. Unfinished Business: – NONE

7. New Business – NONE

8. Acceptance of Previous Minutes:

The minutes of July 14, 2015 were accepted as presented.

9. Board Member or CEO Issues or Comment – NONE

10. Adjournment

Mr. Wilson moved to adjourn. Seconded by Mr. Pinkham. Motion carried unanimously.

The Board of Appeals meeting of July 28, 2015 adjourned at 8:34 p.m.

POST DATE: 7/22/15 – PORTSMOUTH HERALD

Legal Notice NOTICE OF PUBLIC HEARING TOWN OF KITTERY - BOARD OF APPEALS 200 Rogers Road, Kittery, Maine 03904 Tuesday, July 28, 2015 - 7:00 p.m. Jeremy Kites, Map 11, Lot 28A, 46 Martin Road, Suburban Residential zone (RS) Requesting Miscellaneous Variation Request to the terms of Title 16.7.3.5.5.A & 16.7.3.5.6.B, to replace an existing 9' 5" x 27' 10" shed with a 12' x 24" garage, going no closer than existing structure. Thomasine Piche, Owner, Bruce Piche, Timothy Moore, Applicants, for Map 9 Lot 143, 7 Shapleigh Road, Business-Local 1 B-L1 zone requesting Special Exception for Mechanical services & engine repair per Title 16.3.2.9.C.8. Application information is available for public inspection between 8:00 am to 6:00 pm, Monday thru Thursday, at the Town Planning, Code, and Development Department located in Kittery Town Hall. To request a reasonable accommodation for this meeting please contact staff.